STATE OF MICHIGAN

SUPREME COURT

CHARLES STARKS, JR.,

Plaintiff/Appellant,

v

MICHIGAN WELDING SPECIALISTS, INC., a Michigan corporation, AUGUST F. PITONYAK, an individual, and DEBORAH ULRY, an individual,

Defendants/Appellees.

Supreme Court No. 130283
Court of Appeals No. 257127
Lower Court No. 2001-5581-CZ

_____/

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130283 **APPELLEES' SUPPLEMENTAL BRIEF IN OPPOSITION TO APPELLANT'S APPLICATION FOR LEAVE**

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE

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JURISDICTIONAL STATEMENT

This Court has jurisdiction of this matter pursuant to MCR 7.301, and MCR 7.302.

Rule 7.301, states, in pertinent part, as follows:

> **(A) Jurisdiction.** The Supreme Court may:
>
> . . .
>
> (2) review by appeal a case pending in the Court of Appeals or after decision by the Court of Appeals (see MCR 7.302);
>
> MCR 7.301 (A)(1),(2).

MCR 7.302 further specifies the grounds upon which leave may be granted.

> (B) Grounds. The application must show that
>
> (1) the issue involves a substantial question as to the validity of a legislative act;
>
> (2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;
>
> (3) the issue involves legal principles of major significance to the state's jurisprudence;
>
> . . .
>
> (5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; . . .
>
> MCR 7.302 (B)(1)-(3), (5).

STATMENT OF QUESTIONS INVOLVED

I. **ON APRIL 7, 2006, *Starks v Michigan Welding Specialists, Inc*, 474 Mich 1103; 711 NW2d 741 (2006), THIS COURT ISSUED AN ORDER DIRECTING THE PARTIES TO FILE SUPPLEMENTAL BRIEFS ADDRESSING ITS OPINION IN *Foster v Cone-Blanchard*, 460 Mich 696; 597 NW2d 506 (1999), SPECIFICALLY REGARDING THE FIFTH EXCEPTION TO CORPORATE SUCCESSOR LIABILITY.**

(1) **Whether defendant is liable to plaintiff under the fifth narrow exception to the traditional rule of a corporation purchaser's nonliability for the purchased corporation's liabilities when the purchase is accomplished by an exchange of cash for assets--that is, "where the transferee corporation was a mere continuation or reincarnation of the old corporation."**

The trial court answered "No" to this question.
The Michigan Court of Appeals answered "No" to this question.
The Appellant contends the answer should be "Yes" to this question.
The Appellee contends the answer should be "No" to this question.

(2) **Whether the fifth stated narrow exception discussed in *Foster* is precluded when there is a tertiary relationship between the purchasing entity and the purchased entity.**

The trial court did not answer this question.
The Michigan Court of Appeals did not answer, but applied the exception.
The Appellant did not answer this question.
The Appellee contends the answer should be "Yes" to this question.

(3) **Whether the continuity of enterprise doctrine as discussed in *Foster* has application beyond product liability cases.**

The trial court did not answer this question.
The Michigan Court of Appeals did not answer, but applied the exception.
The Appellant did not answer this question.
The Appellee contends the answer should be "Yes" to this question.

(4) **Whether the continuity of enterprise doctrine applies to the facts of this case.**

The trial court answered "No" to this question.
The Michigan Court of Appeals answered "No" to this question.
The Appellant contends the answer should be "Yes" to this question.
The Appellee contends the answer should be "No" to this question.

COUNTERSTATEMENT OF FACTS

I. INTRODUCTION.

This Court, in an Order issued April 7, 2006, sought supplemental briefs relating its Opinion of *Foster v Cone-Blanchard Mach Co*, 460 Mich 696; 597 NW2d 506 (1999) to the instant case, specifically as relates to the fifth stated exception to the general rule of corporate successor liability. *Starks v Michigan Welding Specialists, Inc*, 474 Mich 1103; 711 NW2d 741 (2006) (*Exhibit A); Foster v Cone-Blanchard Mach Co*, 460 Mich 696, 702; 597 NW2d 506 (1999).

Appellant has already sought this Court's review of an Order issued by the Michigan Court of Appeals on November 29, 2005. *Exhibit B.* The court of appeals opinion affirmed the findings of the Macomb County Circuit Court ("trial court") and the trial court's dismissal of Plaintiff/Appellant's claims, by way of the trial court's opinion and order dated May 13, 2004. *Exhibit C.* That Order granted Defendants' (Appellees' herein) Motion for Reconsideration, following a previous denial of Defendants' Motion for Clarification. *Exhibit C.* In clarifying its prior opinion, the trial court dismissed the remaining claims against the Defendants. *Exhibit C.*

II. CHRONOLOGY

To summarize, this case stems from 1994 trial court action ("1994 case") in which current Appellant Starks ("Appellant") and his company, Accurate Welding, Inc. ("Accurate") obtained a Judgment against a company known as Dualtech, Inc.

("Dualtech") and Lawrence Ulry ("Ulry"), a principal of Dualtech. *Defendants' Brief in Support of Motion for Clarification, p 2; Appellees' Brief on Appeal, p 1.*

After Appellant obtained a Judgment against Ulry in the 1994 case, Appellant brought post-judgment garnishment claims against Appellees August F. Pitonyak ("Pitonyak") and Michigan Welding Specialists, Inc. ("MWS") (collectively, "Appellees"). *Defendants' Brief in Support of Motion for Clarification, p 2; Appellees' Brief on Appeal, p 1.*

Claims in the 1994 case were dismissed against Pitonyak and MWS, but Appellee had already initiated a separate action in 2001, the instant case. *Defendants' Brief in Support of Motion for Clarification, p 2.* In the instant case, Appellee brought a host of "new" claims, but, importantly, Appellant's allegations hinge upon the sale of all of Dualtech's assets ("assets") to MWS. *Defendants' Brief in Support of Motion for Clarification, p 19; Appellees' Brief on Appeal, p 11, 16, 19; Exhibit D, Nowacki Dep, p 19, 58-59; Exhibit E, Starks' Dep,* p 58, 59, 65; *Exhibit F.* Those assets had been foreclosed upon by two banks, which were secured creditors with priority over Appellant, pursuant to valid security agreements. *Defendants' Brief in Support of Motion for Clarification, p 19; Appellees' Brief on Appeal, p 11, 16, 19; Exhibit D, Nowacki Dep, p 19, 58-59; Exhibit E, Starks' Dep,* p 58, 59, 65; *Exhibit F.*

The banks subsequently sold those assets to MWS, with full knowledge of Appellant, who declined to participate in the sale. *Defendants' Brief in Support of Motion for Clarification, p 3; Appellees' Brief on Appeal, p 20 ; Exhibit F, p 23-24; Exhibit G.*

This action is not appropriate, pursuant to MCR 7.302, for a grant of leave.

ARGUMENT

I. DEFENDANT IS NOT LIABLE TO PLAINTIFF UNDER THE FIFTH NARROW EXCEPTION TO THE TRADITIONAL RULE OF A CORPORATE PURCHASER'S NONLIABILITY FOR THE SELLER CORPORATION'S LIABILITIES UNDER *Foster v Cone-Blanchard*, 460 Mich 696, 702; 597 NW2d 506 (1999): "WHERE THE TRANSFEREE CORPORATION WAS A MERE CONTINUATION OR REINCARNATION OF THE OLD CORPORATION," -- WHEN THE PURCHASE IS ACCOMPLISHED BY AN EXCHANGE OF CASH FOR ASSETS AND SOLD AFTER BANK FORECLOSURE.

A. INTRODUCTION.

Application of the specific fifth exception to the general rule of corporate successor liability—as stated in *Foster*—to the facts at hand, must begin with the progression and growth of the fifth exception from the traditional rule of corporate successor liability.

Traditionally, under Michigan law, "where one corporation sells its assets to another, the purchaser is not responsible for the debts and liabilities of the seller." *Shue & Voeks, Inc v Amenity Design & Mfg, Inc*, 203 Mich App 124, 128; 511 NW2d 700, 701-702 (1993), citing *Stevens v McLouth Steel Products Corp*, 433 Mich 365; 446 NW2d 95 (1989); *see, also Turner v Bituminous Cas Co*, 397 Mich 406; 244 NW2d 873 (1976); *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559; 696 NW2d 735 (2005). Only under certain circumstances will liabilities of a seller be imposed upon a purchaser. Such circumstances exist where (1) the transaction amounts to a consolidation or merger, (2) the acquiring corporation expressly or impliedly agrees to assume the selling corporation's obligations, (3) the new corporation is a mere continuation of the old corporation, or (4) the sale is fraudulent. *Zantel Marketing Agency v Whitesell Corp*, 265

Mich App 559, 570; 696 NW2d 735, 741 (2005), *citing Shue & Voeks, Inc,* 128; *Antiphon, Inc v LEP Transport, Inc,* 183 Mich App 377, 382-383; 454 NW2d 222 (1990).

Thus, the "traditional rule" of successor liability examines the nature of the transaction between corporations. *Craig ex rel Craig v Oakwood Hosp,* 471 Mich 67; 684 NW2d 296 (2004). In general, where the acquisition of one corporation by another is accomplished by merger, with shares of stock serving as consideration, the successor generally assumes the liabilities of the predecessor. *Foster v Cone-Blanchard Mach Co,* 460 Mich 696; 597 NW2d 506 (1999); 92 ALR 5th 707 (1999). However, on the other hand, when one corporation sells all its assets to another, the purchaser is not, without the above circumstances, responsible for debts and liabilities of the selling corporation. *Turner v Bituminous Cas Co,* 397 Mich 406, 434; 244 NW2d 873, 885 (1976).

This "traditional rule" demonstrates general corporate policies, including those which protect creditors and shareholders, facilitate determination of tax responsibilities, and promote free alienability of business assets. *Foster v Cone-Blanchard Mach Co,* 460 Mich 696; 597 NW2d 506 (1999); 92 ALR 5th 707 (1999).

However, with regard to tort law, the traditional rule's narrow exceptions were criticized as 'form over substance,' which may have caused victims of a defective product without recourse." Callaghan's Michigan Pleading and Practice (2d ed), §15:76; citing *Foster v Cone-Blanchard Mach Co,* 460 Mich 696; 597 NW2d 506 (1999); 92 ALR 5th 707 (1999). "These policy concerns shaped the supreme court's expansion of the traditional rule in a later case." *Id,* citing *Turner v Bituminous Cas Co,* 397 Mich 406; 244

NW2d 873 (1976); *Foster v Cone-Blanchard Mach Co*, 460 Mich 696; 597 NW2d 506 (1999); 92 ALR 5th 707 (1999).

Therefore, in examining the circumstances surrounding a product liability action "[i]n *Turner v. Bituminous Casualty Co.*, 397 Mich. 406, 244 N.W.2d 873 (1976), this Court held that an acquiring corporation may be held liable for products liability claims arising from activities of its predecessor corporation if the transaction demonstrates the requisite "continuity of enterprise". This significant departure from traditional corporate theory rested heavily on the public policy implicit in products liability law that the manufacturer is best able to provide for the risk of defective products." *Langley v Harris Corp*, 413 Mich 592, 595-596; 321 NW2d 662, 664-665 (1982). Thus, the rule of "continuity of enterprise," for product liability cases which arise subsequent to corporate transfers, was created. *Pelc*, 352.

Subsequent opinions have found that, therefore, in *Turner v Bituminous Casualty Co, supra*, this Court rejected the narrow traditional corporate successor nonliability exceptions as inapplicable to cases of products liability. *Pelc v Bendix Mach Tool Corp*, 111 Mich App 343, 352-353; 314 NW2d 614, 618 (1981). Such cases note this Court's reasoning in *Turner*, that "the traditional corporate law approach was neither legally nor logically related to the policy considerations underlying the evolving law of products liability." *Pelc*, 352, citing *Turner*.

In *Turner*, this Court held that a corporation which has acquired the manufacturer of a product may be subject to liability for that product; the opinion states

that this Court would "adopt the rule that in the sale of corporate assets for cash, the first, third and fourth criteria set forth in the Shannon quotation . . . shall be guidelines to establish whether there is continuity between the transferee and the transferor corporations. If there is such continuity, then the transferee must accept the liability with the benefits." *Turner v Bituminous Cas Co*, 397 Mich 406, 430; 244 NW2d 873, 883 (1976). Liability for a predecessor's defective products would be imposed when "the totality of the acquisition demonstrates a basic continuity of the enterprise between the predecessor and successor corporations. Thus, under *Turner,* successor liability becomes an element of the plaintiff's prima facie case of products liability." *Foster v Cone-Blanchard Mach Co,* 460 Mich 696, 701-702, 597 NW2d 506, 509 (1999); *Pelc*, 352; *Perceptron, Inc v Silicon Video, Inc*, 423 F Supp 2d 722, 727 (ED Mich, 2006).

Under *Turner*, a corporation which acquires the assets of another for cash may be liable for products liability claims against the seller where the totality of the acquisition demonstrates a basic continuity of the enterprise, based upon: (a) continuity of management, personnel, physical location, assets and general business operations, (b) the selling corporation ceases its ordinary business operation, liquidates and dissolves as soon as legally and practically possible and (c) the purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations; the first factor has the most significance. Turner v Bituminous Cas Co, 397 Mich 406; 244 NW2d 873 (1976). "*Turner* identified, as an additional principle relevant to determining successor liability, whether the

purchasing corporation holds itself out to the world as the effective continuation of the seller corporation." *Foster*, 703-704, citing *Turner*, 434. The *Foster* opinion further notes that 'holding out to the world' as the same business "has been called the fourth guideline of the *Turner* continuity of enterprise analysis" but notes that "the first three guidelines were intended to complete the continuity enterprise inquiry where there is a sale of corporate assets . . . [and] *Turner* went on to identify as a separate and relevant inquiry whether a purchasing corporation holds itself out as the effective continuation of the seller." *Foster*, 704; see also *Pelc v Bendix Mach Tool Corp*, 111 Mich App 343, 352-353; 314 NW2d 614, 618 (1981).

The *Turner* analysis "concluded that, for the purposes of products liability, 'there is no basis for treating a purchase of corporate assets different[ly] from a de facto merger.' . . . The traditional rule, on the other hand, is a creature of corporate law: We recently described the scope of successor liability in *Foster*." *Perceptron, Inc v Silicon Video, Inc*, 423 F Supp 2d 722, 727 (ED Mich, 2006), citing *Turner*, 423; internal citations omitted.

In *Foster v Cone-Blanchard Mach Co*, 460 Mich 696; 597 NW2d 506 (1999), this Court further delved into the exceptions to traditional corporate successor liability. Under *Foster*, where a corporate purchase is accomplished by an exchange of cash for assets, the successor is generally still not liable for the predecessor's liabilities, unless one of five narrow exceptions applies. *Foster*, 460 Mich 696; 597 NW2d 506 (1999). These exceptions are:

(1) where there is an express or implied assumption of liability;
(2) where the transaction amounts to a consolidation or merger;
(3) where the transaction was fraudulent;
(4) where some of the elements of a purchase in good faith were lacking, or where the transfer was without consideration and the creditors of the transferor were not provided for; or
(5) where the transferee corporation was a mere continuation or reincarnation of the old corporation.

Foster, 702-703.

Generally, under *Foster*, successor liability remains an element of a plaintiff's case of products liability. *Foster*, 704. In *Foster*, this Court "observed the 'traditional rule' that successor liability requires an examination of 'the nature of the transaction between predecessor and successor corporations.' In a merger in which stock is exchanged as consideration, the successor corporation 'generally assumes all its predecessor's liabilities' [but] [w]hen the successor purchases assets for cash, however, the successor corporation assumes its predecessor's liabilities *only*" where the five exceptions exist. *Craig ex rel Craig v Oakwood Hosp*, 471 Mich 67, 96; 684 NW2d 296, 314 (2004).

The "continuity of enterprise" doctrine is essentially a departure from the traditional rule of nonliability for corporations which acquire another through a purchase of assets, and establishes instances in which a successor may be liable for a predecessor's defective products, if the totality of the circumstances surrounding the acquisition demonstrates a basic continuity of the enterprise between the predecessor and successor corporations. *Foster*, 702.

Here, the totality of the circumstances demonstrates that Appellee MWS is not a "mere continuation" under the fifth exception:

1. MWS purchased foreclosed assets, formerly of Dualtech, from secured creditors. *Exhibit C, D, E, F, G; Defendants' Brief in Support of Reconsideration ("Defendants' Brief") 2-4, 11, 13.*
2. MWS and Dualtech are separate entities. *Exhibit H, I; Defendants' Brief, 19.*
3. MWS gave notice to the world that it was a new company. *Exhibit J.*
4. Appellant recognized that the banks had priority, and valid security agreements were in place between Dualtech and the banks. *Exhibit E, 19, 58-59; Exhibit K; Exhibit L; Defendants' Brief, 19.*
5. Dualtech surrendered its assets and dissolved, and creditors were notified that the assets would be sold. *Exhibit M; Exhibit N; Defendants' Brief, 3, 11, 19.*
6. MWS is a fully-capitalized, fully-functioning Michigan corporation, and the shareholders of the two companies are entirely different. *Exhibit H: Exhibit I.*
7. Appellant had several opportunities to participate in the sale and refused. *Exhibit E; Exhibit G.*
8. There is no product liability action, and no injured plaintiff. *Exhibit B; Exhibit C, passim; Appellant's Brief in Support of Leave ("Appellant's Brief"); Defendants' Brief.*

Appellant here is not the type of plaintiff *Turner* and *Foster* sought to protect. No injustice results from dismissal of Appellant's claims, and the appellate court's dismissal of Appellant's claims must be affirmed.

B. APPLICABILITY.

The doctrine of successor liability is derived from equitable principles. *Craig v Oakwood Hosp,* 471 Mich 67, 77; 684 NW2d 296 (2004) (citations and internal quotations

omitted). Generally, when one corporation sells its assets to another, the purchaser is not responsible for the debts and liabilities of the selling corporation. *Id.*

> The traditional rule of successor liability **examines the nature of the transaction between predecessor and successor corporations**. . . . [W]here the purchase is accomplished by an exchange of cash for assets, the successor is not liable for its predecessor's liabilities unless one of five narrow exceptions applies. The five exceptions are as follows:
>
> > "(1) where there is an express or implied assumption of liability; (2) where the transaction amounts to a consolidation or merger; (3) where the transaction was fraudulent; (4) where some of the elements of a purchase in good faith were lacking, or where the transfer was without consideration and the creditors of the transferor were not provided for; **or (5) where the transferee corporation was a mere continuation or reincarnation of the old corporation.**
>
> *Foster v Cone-Blanchard Mach Co*, 460 Mich 696, 702; 597 NW2d 506, 509-510 (1999), emphasis added.

In making such a determination, a court will look to the totality of the circumstances of the transaction. *Craig, supra.* In such a totality of the circumstances review, all factors will weigh in whether a continuity of enterprise exists, including whether the new corporation held itself out as a continuation. In many of these instances, the cases have examined the "continuity of enterprise" doctrine in a similar context to *Foster*, finding that, under *Turner*, there is some interplay with the de facto merger analysis. *Foster*, 705. However, courts find that, in imposing successor liability under most continuity of enterprise theories, that the simple hiring of employees, and use of the same location is insufficient; generally, for a finding of a continuity of enterprise, more is necessary. "The traditional 'mere continuation' exception to the general rule of purchaser nonliability 'encompass[es] the situation where one

corporation sells its assets to another corporation with the same people owning both corporations.'" *City Management Corp v US Chemical Co, Inc*, 43 F3d 244, 251 (CA 6, 1994), citing *Turner,* 244 NW2d, 892; *Thompson v Mobile Aerial Towers*, 862 F Supp 175, 179 (ED Mich, 1994); *Lemire v Garrard Drugs*, 95 Mich App 520; 291 NW2d 103 (1980).

Further, this Court, in "*Turner,* 397 Mich. at 426, 244 N.W.2d 873; . . . discussed . . . evidence showing how the successor in that case was carrying on the business of the predecessor. Thus, 'holding itself out as the effective continuation of the predecessor' . . . is evidence that goes to the "continuation of the enterprise" factor. *See id.* at 430-31, 244 N.W.2d 873." *Neagos v Valmet-Appleton, Inc*, 791 F Supp 682, 691 (ED Mich, 1992), citing *Turner.*

"[I]n deciding whether successor liability attaches, Michigan courts have often considered **whether the purchasing corporation holds itself out to the world as the effective continuation of the seller** corporation." *Thompson v Mobile Aerial Towers*, 862 F Supp 175, 179 (ED Mich, 1994), emphasis added. Michigan law holds that the simple hiring of employees and conducting the same business as a seller corporation is wholly insufficient evidence of a *de facto* merger. *Shue & Voeks, Inc v Amenity Design & Mfg, Inc*, 203 Mich App 124, 128; 511 NW2d 700 (1993); *Lemire v Garrard Drugs*, 95 Mich App 520; 291 NW2d 103 (1980).

The appellate court, in the instant case, noted the fifth *Foster* exception and stated that ". . . although the *Turner/Foster* factors were applied where the successor corporation purchased the assets directly from the predecessor corporation, not from a

lienor that had foreclosed on the assets, as is the case here, the imposition of successor liability is equitable in nature and applies to the "totality of the transaction." *Starks v Michigan Welding Specialists, Inc*, 2005 WL 3179647, *3 (Mich App) (Mich App, 2005), *Exhibit B.*

Still, even had the appellate court not chosen to apply the *Turner/Foster* exceptions, the court considered the totality of the transaction and whether there was a merger or continuity of enterprise, and it found none. The appellate court stated, in part:

> All of the evidence presented to the lower court supports the finding that National City validly foreclosed on all of Dualtech's assets, including goodwill, and validly sold those assets to MWS. Likewise, plaintiff presented no evidence to the lower court that MWS expressly or impliedly assumed Dualtech's liabilities. This Court's inquiry, therefore, must focus on whether (1) the transaction was a consolidation or merger (either de jure or de facto), and (2) whether MWS is a "mere continuation" of Dualtech. *Starks*, *4 , *Exhibit B.*

After this consideration, the appellate court, noting that the banks, not Dualtech, were the seller; Dualtech's ceasing business prior to the sale; and MWS expressly stating that it was a new company and that Dualtech had gone out of business found that "[i]n reviewing the 'totality of the transaction' from Dualtech to National City to MWS, we find that there is insufficient continuity of enterprise to justify the imposition of successor liability." *Starks*, *4 , *Exhibit B.* In fact, the appellate court further found, just as the trial court had, that there was no evidence of the merger nor of the mere continuation Appellant alleged. *Exhibit B; Exhibit C.* The appellate court stated:

> Here, these factors do not support the imposition of successor liability. First, although there was a basic continuity of operation and MWS hired many of Dualtech's key personnel, including the Ulrys, Dualtech was not the seller corporation, National City was. Next, even though Dualtech was not the seller corporation, it ceased doing ordinary business and dissolved *before* MWS purchased the assets. Lastly, although MWS may have assumed payment of some of Dualtech's liabilities necessary to continue normal business operations, MWS sent a letter to its customers and suppliers expressly stating that Dualtech went out of business and that MWS is a new corporation with different ownership. MWS, therefore, did not hold itself out to the world as an effective continuation of Dualtech. In reviewing the "totality of the transaction" from Dualtech to National City to MWS, we find that **there is insufficient continuity of enterprise to justify the imposition of successor liability**. *Starks v Michigan Welding Specialists, Inc*, 2005 WL 3179647, *3 (Mich App) (Mich App, 2005), *Exhibit B*.[1] emphasis added.

Here, the facts and evidence show that there was no "continuity of enterprise." *Exhibit B; Exhibit C; Exhibit H; Exhibit I, Defendants' Brief, 8-10.* MWS is a separate entity from Dualtech, and MWS sent a letter announcing itself as a new company. *Exhibit J.* MWS never held itself out as a continuation of Dualtech. *Exhibit H; Exhibit I; Exhibit J.* Indeed, MWS would have been hard-pressed to hold itself out as a continuation of Dualtech, when Dualtech had already surrendered its assets to the bank, and had gone out of business. *Exhibit D; Exhibit E; Exhibit G; Exhibit K Exhibit M.* Further, the shareholders of the two companies are different; Ulry never had any interest or control in MWS. *Exhibit H; Exhibit I; Exhibit J; Defendants' Brief, 10.* The appellate court correctly found that there was no mere continuance in this matter, and the appellate court must be affirmed.

[1] Appellees do note that the "key personnel" as referenced may have been key to Dualtech, but not necessarily "key" in MWS; for instance, Ulry is not in a management position at MWS, but is in sales, and Mrs. Ulry is a member of the clerical staff.

II. THE FIFTH STATED NARROW EXCEPTION DISCUSSED IN *FOSTER* MUST BE PRECLUDED WHEN THERE IS A TERTIARY RELATIONSHIP BETWEEN THE PURCHASING ENTITY AND THE PURCHASED ENTITY, PARTICULARLY WHEN THE PURCHASER PURCHASES ASSETS SUBSEQUENT TO A BANK FORECLOSURE.

The fifth exception set forth in *Foster* describes a "mere continuation," or "reincarnation" of the same enterprise, and the wording of *Foster* indicates that a sale through a tertiary relationship is generally inappropriate in the absence of a product liability claim. *Foster,* 704.

First, the *Foster* opinion acknowledges a tertiary relationship, but it notes that a tertiary relationship "generally factors **against** a finding of continuity." *Foster,* 704, emphasis added. Further, although *Foster* does state that such a tertiary relationship would not prelude its applicability altogether, the case itself centers upon a products liability action, and notes quite specifically that "**in the appropriate case** a tertiary successor might be liable **for a manufacturer's defective product.**" *Foster,* 704-705, emphasis added. Certainly, this statement would be consistent with an interpretation that it is inappropriate to hold a purchaser liable in a tertiary sale when there is no defective product.

This is also consistent with *Foster's* general intent to protect an injured victim in a product liability action, not in a traditional corporate action; the *Foster* opinion goes on to state, in pertinent part, as follows:

> Although in the appropriate case a tertiary successor might be liable **for a manufacturer's defective product**, we conclude, on the basis of our interpretation of *Turner,* that this is not such a case.

> This case illustrates the limits of *Turner's* applicability. *Turner's* holding indicates that the "continuity of enterprise" doctrine applies only when the transferor is no longer viable and capable of being sued: In our analysis of the matter we must conclude at this point that **in a products liability case where the corporation fabricating the injury-producing item changes corporate structure before injury** and suit, **as a matter of policy neither the victim** nor the successor corporation has a different interest vis-à-vis the suit . . . . *Foster*, 704-705, emphasis added.

The cases of *Turner, Foster,* and subsequent citing successor liability cases contemplate the transfer of assets directly from a selling corporation to a purchasing corporation. *Turner, supra; Foster, supra; Ammend, supra; Craig, supra.* Indeed, the appellate court in the instant action likewise noted this, stating that in most cases "the *Turner/Foster* factors were applied where the successor corporation purchased the assets directly from the predecessor corporation, not from a lienor that had foreclosed on the assets, as is the case here." *Starks, Exhibit E, p 3; Exhibit B.*

As the appellate court acknowledged in this case, there was no direct transfer between the corporations in this matter, nor was there a defective product. *Exhibit B; Exhibit C; Exhibit F.* Instead, two banks which were undisputedly secured creditors of highest priority, foreclosed upon the Dualtech assets. *Defendants' Brief, 4, 7-15, 19; Appellees' Brief, p 1, 2, 11-16, 18-23, 25; Exhibit B; Exhibit C; Exhibit E; Exhibit F; Exhibit L; Exhibit M; Exhibit N.* The banks, in no position to run the business themselves, and wishing to prevent further monetary loss, prepared to sell, and did sell, the assets. *Exhibit N.*

To impose successor liability for a judgment creditor, through a tertiary relationship—in this instance, a foreclosure—would potentially chip at established secured transactions law.

Here, MWS never bought, borrowed or otherwise took any assets from Dualtech, but instead made the valid asset purchase through the bank, subsequent to bank foreclosure. *Defendants' Brief, 4, 7-15, 19; Appellees' Brief, p 1, 2, 11-16, 18-23, 25; Exhibit B; Exhibit C; Exhibit E; Exhibit F; Exhibit L; Exhibit M; Exhibit N.* It is undisputed that the banks were secured creditors. *Exhibit E, Stark's dep, p 19, 58; Exhibit F; Exhibit L; Exhibit M; Exhibit N.* Therefore, the banks were the rightful owners, and MWS paid to the banks the sale price in a valid agreement. *Exhibit D; Exhibit F; Exhibit G.* Plaintiff had simply refused to do the same. *Exhibit D; Exhibit E p 23-24; Exhibit G.* Thus, it was for the banks to sell those assets as they saw fit. Were the banks to have operated the business themselves, they would not have been liable for Dualtech's debts—they were simply priority secured creditors.

In this case it is particularly important to recall that prior the actual sale between the banks and MWS, Appellant had notice of the sale of the assets by National City Bank, and had opportunity to purchase the assets, but refused to do so. *Exhibit E; Exhibit G.* Appellant even refused to make a competitive offer. *Exhibit G.* Appellant stated that he refused to make an offer because he thought Appellee was paying too much. *Exhibit E, 64.* Yet, he objected to the sale to MWS (rather than sale at auction) because there was a chance the price would be more. *Exhibit E, 64.* The assets had been

foreclosed and had become property of the bank. *Exhibit F; Exhibit G.* It was neither for Appellees, nor Dualtech, nor Appellant to determine the price. To make the banks liable, after foreclosure, to a judgment creditor would yield an absurd result. To make a purchaser, after foreclosure, liable as a successor yields the same result.

Neither the trial court nor the appellate court erred in dismissing Appellant's successor liability claim; the tertiary relationship of Dualtech and MWS through a foreclosure sale must preclude the fifth exception in *Foster*. The appellate court's dismissal must be affirmed.

III. THE CONTINUITY OF ENTERPRISE DOCTRINE, AS DISCUSSED IN *FOSTER*, SHOULD NOT HAVE APPLICATION BEYOND PRODUCT LIABILITY CASES, AND/OR SHOULD NOT APPLY IN THE INSTANT CIRCUMSTANCES.

The *Foster* continuity of enterprise doctrine should not apply beyond products liability actions, and, in particular, should not apply to the instant circumstances. The wording of *Foster*, as well as *Turner*, indicate that the exceptions to the traditional rule were based upon the protection of injured parties. *Foster, supra; Turner, supra.* "[T]he so-called 'general rule of nonliability' whereby, with certain limited exceptions, the purchasing corporation is not liable for obligations of the transferor corporation . . . developed not in response to products liability problems, but largely in the areas of creditors' protection. *Turner*, 417-418.

Courts have viewed the original intent of the 'continuity of enterprise doctrine' as one to protect injured parties, and have based decisions upon that intent, and have

issued subsequent rulings with an eye toward that intent. *See, Craig, supra; Perceptron, Inc v Silicon Video, Inc*, 423 F Supp 2d 722 (ED Mich, 2006).

In *Perceptron*, the court, in analyzing *Turner*, stated that, ". . . the Michigan Supreme Court adopted the guidelines in *Turner* as a result of the **underlying policy considerations involved in products liability actions**, namely, the policy **that manufacturers are better suited to bear the risk of defective products and the products liability rule of continuity**." *Perceptron, Inc v Silicon Video, Inc*, 423 F Supp 2d 722, 727-728 (ED Mich, 2006).

"[A] corporate successor may be liable for **injuries caused by its predecessor's defective products** if the totality of the acquisition demonstrates 'a basic continuity of the enterprise' between the predecessor and successor corporations." *Ammend v BioPort, Inc*, 322 F Supp 2d 848, 865 (WD Mich, 2004), emphasis added, citing *Turner*, 418-419; citing *Foster*, 703. "This theory, the *Turner* court reasoned, better served the policy considerations underlying products liability law" than did the traditional rule. *Id*, citing *Turner*, 418-19.

Recently, this Court explained its application of the factors it set forth in *Turner* and *Foster*, stating:

> The thrust of the decision in *Turner* was to **provide a remedy to an injured plaintiff** in those cases in which the first corporation "legally and/or practically becomes defunct." ... **The underlying rationale for the *Turner* Court's decision to disregard traditional corporate law principles was to provide a source of recovery for injured plaintiffs.**
> *Craig ex rel Craig v Oakwood Hosp*, 471 Mich 67, 98-99; 684 NW2d 296, 315 (2004), citing *Foster, supra* at 705-706, 597 NW2d 506, emphasis added.

It is undisputed that this case arises from a judgment, not from a product liability action. *Defendants' Brief; Appellant's Brief; Exhibit B; Exhibit C; Exhibit E.* It is further undisputed that the debtor corporation's assets were subject to security agreements and foreclosed upon *Exhibit D; Exhibit E; Exhibit G.* Still, Appellant would have this Court believe that some manner of fraud existed between the two companies, and that an injustice will result from this Court's not granting him leave to appeal. *Appellant's Brief.* However, the evidence shows otherwise: all of Dualtech's were secured by the banks, the banks foreclosed, and the Ulrys declared bankruptcy. *Defendants' Brief, p 4, 7-15, 19; Appellees' Brief, p 1, 2, 11-16, 18-23, 25; Opinion and Order of the trial court, Exhibit C; Exhibit D; Exhibit E; Exhibit G.* The entire time, prior to the asset sale to MWS, Appellant involved, informed and had every opportunity to participate in the asset purchase. *Exhibit* Appellant flatly refused to do so. *Exhibit E; Exhibit G.*

At the very heart of the opinions of *Turner* and *Foster* is the protection of injured plaintiffs—the prevention of their suffering without recourse. There is no injury victim in need of protection from the evils of a wrong-doer corporation. This case could not be more different than what the continuity of enterprise doctrine contemplated. Successor liability must not be imposed here, and the appellate court, in its finding of no successor liability, must be affirmed.

IV. THE CONTINUITY OF ENTERPRISE DOCTRINE, OR "MERE CONTINUATION" EXCEPTION, MUST NOT APPLY TO THE FACTS OF THIS CASE.

For many years, courts have been well-settled that under the traditional rule, a corporation purchasing assets of another for cash will only be responsible for the debts

and liabilities of the selling corporation under narrow circumstances, such as merger or consolidation with no provision for the payment of the obligations of the old corporation; the purchasing corporation promises to pay the debts of the seller; the purchasing corporation is a mere continuance of the selling corporation; or the sale is fraudulent and the property of the selling corporation who is liable for its debts, can be followed into the hands of the purchaser. *Chase v Michigan Telephone Company*, 121 Mich 631 (1899). Michigan courts have repeatedly analyzed these and similar exceptions, and found that a corporation which merely purchases assets is not liable as a successor, unless something more exists. *Id; see also Antiphon, Inc v LEP Transport, Inc*, 183 Mich App 377, 382-383; 454 NW2d 222 (1990); *Jeffery v Rapid American Corp*, 448 Mich 178; 529 NW2d 644 (1995); *Antiphon, Inc, supra; Shue & Voeks, Inc v Amenity Design & Mfg, Inc*, 203 Mich App 124; 511 NW2d 700 (1993); *Turner*, 419; 244 NW2d 873 (1976).; *Shannon v Samuel Langston Co*, 379 F Supp 797, 801 (WD Mich, 1974).

"The doctrine of successor liability is derived from equitable principles." *Craig*, 77. Clearly, Michigan law states that a reviewing court must look to the totality of the circumstances in determining whether a purchasing corporation should bear successor liability. *Id.* Under *Foster*, whether or not one takes the position that the exception applies outside of product liability, part of the 'totality' determination includes whether those circumstances demonstrate a basic continuity of the enterprise. *Foster*, 703.

Generally, under the traditional rule, when considering the 'mere continuation' exception, courts looked for evidence of a continuity of ownership, officers, and

directors and similarities in staff, products marketed, customers, and the use of trade names between the new and old corporations. *Kelley v Thomas Solvent Co,* 725 F Supp 1446 (WD Mich 1988). Where the new business retains some of the predecessor's employees but reduces the number of people employed, and changes the way the company does business, the new corporation is not a mere continuance of the old. *Shue & Voeks,* 128.

Recently, using *Turner,* in *Ammend v BioPort, Inc,* 322 F Supp 2d 848 (WD Mich, 2004),the Federal Court for the Western District of Michigan found that, where a plaintiff would not have had a remedy against an alleged predecessor corporation, that plaintiff subsequently had no remedy against an alleged successor. In *Ammend,* the court found that were the defendant corporation to have a 'predecessor,' that predecessor would have been the State of Michigan, which is, by sovereign immunity, incapable of being sued. *Ammend,* 867. Thus, the *Ammend* court reasoned that an "asset sale . . . did not deprive *Ammend* [p]laintiffs of an effective remedy against the predecessor; [p]laintiffs never had such a remedy in the first place." *Id.* The *Ammend* court found that the case "fails to implicate the policy rationale behind the successor liability doctrine, which *Turner* explained to be the preservation of an injured person's access to relief notwithstanding the occurrence of a corporate transfer between the time the predecessor makes a product and the time a person injured by the product files suit." *Ammend,* 867. The *Ammend* court stated that "to peg [defendant] with successor liability for the actions of its immune predecessor would work an injustice on

[defendant] and deliver an unfair windfall to [p]laintiffs. Rather than losing a remedy that they were once entitled to pursue, [p]laintiffs . . . seek to gain a remedy which they never had prior to the asset sale. Such a result would be as unjust as the outcome *Turner* sought to prevent." *Ammend*, 868.

In the case at bar, Appellant, a Judgment creditor of Dualtech, had lower priority than the banks, and Appellant has acknowledged that this is the case. *Exhibit E; Exhibit G.* Though there was no protection or immunity afforded to Dualtech, as there was to the *Ammend* predecessor, but Dualtech simply had no assets which were not subject to security agreements with the banks. *Exhibit G; Exhibit L; Exhibit M.* Appellant was prevented from recovery simply by virtue of Dualtech's lack of liquid assets coupled with Appellant's priority level as a creditor as to secured assets. *Exhibit D; Exhibit E; Exhibit G.* Further recovery for Appellant was simply futile. *Exhibit M.* In turn, Appellant could not have recovered against the banks, which were simply other secured creditors, albeit creditors of higher priority. *Exhibit G; Exhibit E, p 65; Defendants' Brief for Summary Disposition,15.* Therefore, in a sense, Appellant, like the *Ammend* plaintiff, would have had no further remedy: Dualtech had nothing left. *Exhibit M, N.* Appellant, although he has acknowledged that he had no evidence of fraud, and that he filed suit based on his "feeling," should not be allowed to recover against Appellees for a further recovery than Appellant would have had against Dualtech and Ulry. *Exhibit E, p 49.* This Court in both *Turner* and *Foster* sought to prevent injustice for victims of product liability injury. To allow Appellant, who is not

a victim of product liability, a recovery under these circumstances would not prevent injustice, but would create it. The appellate court's dismissal of the claims must be affirmed.

CONCLUSION

Under the traditional rule, or under the fifth exception of *Foster*, as applied by the appellate court, there is no mere continuation. Based upon the appellate court's findings, no merger, no assumption of liability, no continuity of enterprise, and, importantly, no fraud which would justify a finding of corporate successor liability. Regardless of the test it applied, the appellate correctly found that there was no successor liability. That result must be affirmed.

RELIEF REQUESTED

For the reasons stated herein, Appellees respectfully request this Court deny Appellant's leave to appeal, and affirm the court of appeals Order dated November 29, 2005, and the decision of the Macomb County Circuit Court.

Respectfully Submitted,

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